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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. GLENN ALLEN WARREN, Defendant and Appellant.	C058955 (Super. Ct. No. 07F05958)

On a June morning in 2007, while under the influence of methamphetamine, defendant Glenn Allen Warren ran a stop sign in a stolen Toyota truck, attempted to outrun the sheriff's deputy who was chasing him, and ultimately jumped out of the moving vehicle and ran in an attempt to escape. After defendant was arrested and placed in handcuffs, he said that he was "fucked," and added: "That truck is stolen, man. Some kid brought it over earlier. And he told me it was stolen. I knew I shouldn't have been driving it."

Defendant was convicted by jury of unauthorized taking or driving a vehicle (Veh. Code, § 10851, subd. (a)), receiving a

stolen vehicle (Pen. Code, § 496d, subd. (a)), reckless evasion (Veh. Code, § 2800.2, subd. (a)), and possession of burglary tools (Pen. Code, § 466). Defendant waived jury trial on special allegations that he had three "strike" convictions within the meaning of the three strikes law, and had served seven prior prison terms within the meaning of section 667.5, subdivision (b), of the Penal Code. Defendant admitted each of the seven convictions, but left it for the trial court to determine whether he had served separate prison terms for each conviction. Ultimately, the court found defendant to have served five separate prison terms. The trial court sentenced defendant to an aggregate term of 55 years to life in state prison (25 years to life on the unauthorized taking or driving a vehicle, plus a consecutive 25 years to life on the reckless evasion, plus five consecutive one-year terms for the prison priors (sentence on the receiving a stolen vehicle was stayed; no additional time was imposed on the possession of burglary tools)), and imposed other orders.

On appeal, defendant contends (1) the evidence was insufficient to support defendant's conviction for reckless evasion because undisputed evidence established that the officer who pursued him did not activate his siren; (2) the trial court prejudicially erred by precluding defendant's expert from testifying as to the results of the Structured Interview of Reported Symptoms, a test designed to discern whether an individual's symptoms have been fabricated; (3) defendant's conviction for receiving the stolen vehicle must be reversed

because a person cannot be convicted of both stealing and receiving the same vehicle; (4) the trial court prejudicially erred by failing to instruct the jury, sua sponte, that a person cannot be convicted of both stealing and receiving the same vehicle; and (5) the trial court prejudicially erred by failing to provide the jury, sua sponte, with a unanimity instruction. We disagree with each contention and affirm the judgment.

FACTS AND PROCEEDINGS

The Prosecution

During the early morning hours of June 17, 2007, Deputy Greg Saunders of the Sacramento County Sheriff's Department was assigned to the Rancho Cordova Police Department and was on routine patrol on Croetto Way in Rancho Cordova when he observed a brown 1979 Toyota truck driving toward him. After the truck passed his fully marked police vehicle, Deputy Saunders made a three-point turn in order to get the truck's license plate number for a random registration check. As Deputy Saunders negotiated the second phase of the three-point turn, he witnessed the truck drive through a stop sign, turning eastbound on Malaga Way and accelerating "quite rapidly" out of the turn.

Deputy Saunders immediately activated the overhead lights on his patrol car, notified dispatch of the failure to yield, and followed in pursuit. The truck continued down Malaga Way and ran the stop sign at Tormolo Way at a speed of approximately 40 to 45 miles per hour. It then turned northbound on Tannat

Way, negotiating that turn at roughly 45 miles per hour, and drove on the wrong side of the street for the span of two to three houses. The truck was moving at approximately 35 miles per hour, still on the wrong side of the street, when the driver opened the door and jumped out of the truck, landing on a lawn. The now-driverless truck cut through the same lawn and collided with another truck parked in a driveway.

Defendant got up and ran between two houses. Deputy Saunders, wearing a black uniform with "Rancho Cordova Police" patches, a badge, a name tag, and a duty belt holding his firearm, a flashlight, pepper spray, and a baton, got out of his car and chased defendant. As Deputy Saunders rounded the corner between the houses, he saw defendant walking quickly toward him and yelling something the deputy was unable to understand. Defendant ignored several commands to get on the ground before Deputy Saunders pulled him to the ground by his torso. When defendant refused to show Deputy Saunders his hands, he hit defendant twice in the leg with his flashlight and then put him in handcuffs.

While in handcuffs, defendant said that he was "fucked," and added: "That truck is stolen, man. Some kid brought it over earlier. And he told me it was stolen. I knew I shouldn't have been driving it." Nine keys were found in defendant's front pants pocket. Several of these keys were "shaved down," a condition that enables the keys to "fit into most car ignitions."

Shortly after defendant was taken into custody, police discovered that the 1979 Toyota truck belonged to Sixto Dias. The last time Dias had seen his truck was the afternoon of the previous day. He had given no one permission to drive the vehicle.

The Defense

Defendant testified that he "vaguely" remembered the morning of June 17, 2007. Defendant remembered being "heavily under the influence" of methamphetamine, having injected himself with the drug prior to driving the stolen truck. He remembered that his head felt hot and that he felt "closed in" immediately after taking the drug, which prompted him to take a walk to get some fresh air. During the stroll, defendant remembered hearing his name being called and seeing several "creatures in the bushes" that he believed were trying to hurt him.

The next thing defendant remembered was driving down the road in the truck. When he saw Deputy Saunders, he had a dim realization that the truck was stolen and "step[ped] on the gas" in an "attempt to get away from that police officer." Defendant remembered running the stop sign at Malaga Way, making a turn at Tannat Way, and jumping out of the truck so that he could "get away before [Deputy Saunders] made his turn and caught up" to him. Defendant experienced blurred vision from the time he took the drug until the time he was arrested by Deputy Saunders. Defendant did not remember having any keys in his pocket.

Dr. Jay Jackman, a forensic psychiatrist, testified on the role defendant's methamphetamine use may have played in

the events of June 17. Dr. Jackman interviewed defendant at the county jail, took a detailed history, performed a mental status examination, and administered a Structured Interview of Reported Symptoms (SIRS), a test designed to discern whether an individual's symptoms have been fabricated. Dr. Jackman also listened to defendant's testimony in court.

Dr. Jackman's testimony largely corroborated defendant's claim of being under the influence of methamphetamine on the morning of June 17. Dr. Jackman explained that a person who had taken methamphetamine prior to an event would not have a very good memory of that event upon sobering up. As Dr. Jackman explained, the memory of a methamphetamine user "can go . . . all of the way from having complete amnesia to having a very spotty set of recollections as [defendant] described."

Dr. Jackman confirmed that the hot sensation defendant felt on his head immediately after taking the drug could have been the physiological effect of the injection, i.e., a constricting of the blood vessels as the methamphetamine entered defendant's bloodstream. Dr. Jackman also confirmed that blurred vision and claustrophobia are also physiological effects of methamphetamine use.

Dr. Jackman said that paranoia is a "prominent" feature of stimulant use, and that defendant's description of hearing voices and seeing things that turned out not to be there was a "standard description" given by methamphetamine users. As Dr. Jackman explained: "[Y]ou see something that you couldn't quite identify what it was, and then in your mind, it would

become some object that you could identify, that you could recognize, but when you got up real close, you would recognize that this really wasn't what I thought it was. . . . That's a standard experience with someone who is under the influence of . . . things like methamphetamine." According to Dr. Jackman, defendant's description of seeing creatures that would disappear as he got closer to them indicated "a lower level of distortion than being a hallucination." Dr. Jackman also explained that someone under the influence of methamphetamine could imagine creatures, and later recognize that he was being pursued by a police car.

Verdict and Sentencing

As already indicated, defendant was convicted by jury of unauthorized taking or driving a vehicle, receiving a stolen vehicle, reckless evasion, and possession of burglary tools. Defendant waived jury trial on special allegations that he had three "strike" convictions within the meaning of the three strikes law, and had served seven prior prison terms within the meaning of section 667.5, subdivision (b), of the Penal Code. Defendant admitted each of the seven convictions, but left it for the trial court to determine whether he had served separate prison terms for each conviction; the court found defendant to have served five separate prison terms. The trial court sentenced defendant to an aggregate term of 55 years to life in state prison and imposed other orders.

DISCUSSION

I

Sufficiency of the Evidence of Evasion

Defendant contends the evidence was insufficient to support his conviction for reckless evasion because there was no evidence that Deputy Saunders activated his siren.

"'To determine sufficiency of the evidence, we must inquire whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. In this process we must view the evidence in the light most favorable to the judgment and presume in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. To be sufficient, evidence of each of the essential elements of the crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 387, superseded by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [61 L.Ed.2d 560, 572-574].)

To establish reckless evasion, the People must prove "a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property[.]" (Veh. Code, § 2800.2, subd. (a).) Section 2800.1, subdivision (a), of the Vehicle Code requires the People to prove: "(1) The peace officer's motor vehicle is exhibiting

at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp. [¶] (2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary. [¶] (3) The peace officer's motor vehicle is distinctively marked. [¶] (4) The peace officer's motor vehicle is operated by a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, and that peace officer is wearing a distinctive uniform."

Defendant correctly points out that at no point during the pursuit did Deputy Saunders activate the siren on his patrol car. As Deputy Saunders explained: "The reason why I didn't activate my siren in this particular case, is due to the speeds that I was driving at, and the fact that I was--had one hand on the steering wheel of my patrol car and the radio in my other hand, updating dispatch and other officers where I was going." Defendant is incorrect, however, in his assertion that failure to sound a siren in this case is fatal to his reckless evasion conviction.

Prior to 1982, Vehicle Code section 2800.1 read as follows: "Every person who, while operating a motor vehicle, hears a siren and sees at least one lighted lamp exhibiting a red light emanating from a vehicle which is distinctively marked and operated by a member of the California Highway Patrol, a member of the California State Police, or any peace officer of any sheriff's department or police department wearing a distinctive uniform and who, with the intent to evade the officer, willfully

disregards such siren and light, and who flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor." (Stats. 1981, ch. 600, § 2, p. 2317.)

In 1982, the Legislature passed and the governor signed Assembly Bill No. 3128, which amended Vehicle Code section 2800.1 to read as it currently does. (Stats. 1982, ch. 947, § 2, p. 3433.) As noted, in its current form, subdivision (a)(2) of the statute states that the statute is violated if, in part, "[t]he peace officer's motor vehicle is sounding a siren *as may be reasonably necessary*." (Veh. Code, § 2800.1, subd. (a)(2), italics added.)

The available legislative history of Assembly Bill No. 3128 does not reveal the instances in which the Legislature thought that use of a siren was or was not reasonably necessary.

"Statutes are to be interpreted by ascertaining the Legislature's intent in enacting them. [Citation.] The first step in making this determination is to scrutinize the statute's actual words, giving them their plain and commonsense meaning. [Citation.] If the language is clear and unambiguous, there is no need for construction. [Citation.]" (*People v. Boudames* (2006) 146 Cal.App.4th 45, 51.)

The wording of Vehicle Code section 2800.1, subdivision (a)(2) requires one to conclude by necessary implication that it was not the Legislature's intent to require a pursuing law enforcement officer to activate the vehicle's siren in every case, as the earlier version of Vehicle Code section 2800.1 had

required. Put directly, by the wording of the statute, the Legislature must have decided that there were situations in which use of a siren was *not* reasonably necessary.

The obvious purpose of the conditions set forth in Vehicle Code section 2800.1 is to notify the driver who is being pursued that it is a law enforcement officer who is behind him and not a non-law-enforcement civilian. (See *People v. Hudson* (2006) 38 Cal.4th 1002, 1011; see *id* at p. 1010 [holding that the law enforcement vehicle had to be distinctively marked "so as to give reasonable notice to the fleeing motorist that the pursuit is by the police"]; *People v. Estrella* (1995) 31 Cal.App.4th 716, 723 [in determining whether a law enforcement vehicle is distinctively marked, one must look to the indicia identified with the pursuit vehicle "to ascertain whether a person fleeing is on reasonable notice that pursuit is by a police officer"].)

While one might speculate as to circumstances--such as in low visibility conditions--where use of a siren is reasonably necessary to identify the pursuing car as a law enforcement vehicle, the question comes down to whether the use of a siren in this case was reasonably necessary to notify defendant that he was being pursued by a law enforcement officer. We hold that it was not.

Here, defendant passed Deputy Saunders's patrol car, which was white with black and red stripes down the side, the logo for the City of Ranch Cordova, and the word "Police." According to defendant's own testimony, he recognized the vehicle as being a police vehicle and "step[ped] on the gas" in an "attempt to get

away from that police officer." Deputy Saunders immediately activated the overhead lights (solid red and blue lights facing the front, solid amber facing the back, and rotating red and blue lights also indicating the presence of law enforcement), and followed in pursuit. As defendant himself admitted that he was aware that a police vehicle was in pursuit, he cannot credibly claim that a siren was reasonably necessary to place him on notice that he was being pursued by law enforcement.

Accordingly, we find that a rational trier of fact could have found that a siren was not "reasonably necessary" to put defendant on notice that he was being pursued by a police officer.

II

The Structured Interview of Reported Symptoms

Defendant next contends the trial court prejudicially erred by precluding defendant's expert from testifying as to the results of the SIRS. Specifically, defendant contends that Dr. Jackman should have been allowed to testify to his belief that defendant was not malingering or fabricating the symptoms of methamphetamine use he reported. We disagree.

After Dr. Jackman testified that he interviewed defendant at the county jail, took a detailed history, performed a mental status examination, and administered the SIRS test, defense counsel asked: "All right. Now, with regard[] to the structured interview reported--and the reported systems [*sic*] of malingering, that test that you provided him, did you come to a conclusion as to whether or not [defendant] was

malingering?" The prosecutor's objection on relevance grounds was sustained.

"Only relevant evidence is admissible [citations], and all relevant evidence is admissible unless excluded under the federal or state Constitution or by statute. [Citations.] The test of relevance is whether the evidence 'tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive.'" (*People v. Benavides* (2005) 35 Cal.4th 69, 90, quoting *People v. Garceau* (1993) 6 Cal.4th 140, 177; see also Evid. Code, §§ 210, 351; Cal. Const., art. I, § 28, subd. (d); *People v. Heard* (2003) 31 Cal.4th 946, 972-973.) "The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence. [Citation.] We review for abuse of discretion a trial court's rulings on the admissibility of evidence. [Citations.]" (*Benavides*, *supra*, 35 Cal.4th at p. 90; see also *People v. Crittenden* (1994) 9 Cal.4th 83, 132; *People v. Rowland* (1992) 4 Cal.4th 238, 264.)

Section 28, subdivision (a), of the Penal Code provides in relevant part: "Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." However, as the Attorney General points out, section 29 of the Penal Code "prohibits an expert witness from giving an opinion about the ultimate fact whether a defendant had the required mental state for conviction

of a crime." (*People v. Ochoa* (1998) 19 Cal.4th 353, 431 (*Ochoa*).) Specifically, section 29 of the Penal Code provides: "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact."

In this case, the crime of unauthorized taking or driving a vehicle required the People to prove the specific intent to permanently or temporarily deprive the owner of title to or possession of the vehicle. (Veh. Code, § 10851, subd. (a); *People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1574.) Similarly, the crime of reckless evasion required the People to prove the specific intent to evade a peace officer. (Veh. Code, §§ 2800.1, subd. (a), 2800.2, subd. (a).) The apparent purpose of defendant's testimony that he was high on methamphetamine when he attempted to evade capture in a stolen Toyota truck was to negate the specific intent required for these crimes. Dr. Jackman's testimony corroborating defendant's claim that he was indeed high on methamphetamine at the time was relevant to the issue of whether defendant actually formed the required specific intent to commit these crimes. Such testimony was admissible so long as Dr. Jackman did not testify to the ultimate fact of whether defendant did or did not possess

the required mental state for conviction. (*Ochoa*, *supra*, 19 Cal.4th at p. 431.) However, the proffered testimony *that Dr. Jackman did not believe defendant to be malingering, i.e., manufacturing his symptoms of methamphetamine use,* was not relevant to any controverted material issue because the People never directly questioned the veracity of defendant's reported symptoms.

Nor do we believe that two of the People's questions on cross-examination of Dr. Jackman ("Your opinion is only as good as the source of the information. [That is] a fair statement, right?" and "So, in other words, if you're not getting correct information or if your information is tainted or slanted, based on the motivation of the speaker, then your opinion would be slanted, correct?" rendered the results of the SIRS test relevant. First, these were questions about patients in general, and not specifically questioning the veracity of defendant's report of symptoms. Second, and more importantly, after the doctor responded, "That's why I do the SIRS test, the Structured Interview of Reported Symptoms, to see if they're fabricating their complaints," the People moved away from this line of questioning altogether.

Defendant relies heavily on *People v. Adan* (2000) 77 Cal.App.4th 390 (*Adan*), a case involving workers' compensation fraud. There, Adan was examined by two doctors, Dr. Koegler and Dr. Strait. (*Id.* at p. 392.) Dr. Koegler testified that he believed Adan was exaggerating his symptoms; Dr. Strait testified that he believed Adan was malingering.

(*Id.* at pp. 392-393.) The Court of Appeal held that such testimony did not run afoul of Penal Code section 29 because "testimony that Adan was a malingerer did not establish the required intent to defraud." (*Id.* at p. 393.) In other words, such testimony was admissible as it was relevant to the issue of whether Adan was indeed falsifying his symptoms, and not barred by Penal Code section 29 because it did not embrace the ultimate issue of whether Adan possessed the specific intent to defraud.

We agree with defendant that, just as the testimony in *Adan*, i.e., that Adan was malingering, did not embrace the ultimate issue of whether Adan possessed the specific intent to defraud, the proffered testimony in this case, i.e., that defendant was not malingering, would not have embraced the ultimate issues of whether defendant possessed the specific intent to evade Deputy Saunders and permanently or temporarily deprive Sixto Dias of his Toyota truck. However, unlike *Adan*, a fraud case, where testimony on the issue of the falsification of symptoms was clearly directly relevant, we cannot say that the trial court abused its discretion in excluding the evidence.

Moreover, as defendant points out, any such error requires reversal only if it is reasonably probable the error affected the verdict adversely to defendant. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1089.) Here, there is no such probability.

We note that Dr. Jackman was allowed to testify that he had administered the test, that the test helped determine whether or not a person was malingering and that it was "a very good test for that purpose."

Viewing Dr. Jackman's testimony as a whole, it is abundantly clear that he believed defendant's symptoms to be genuine and not manufactured. No reasonable juror, listening to the entirety of Dr. Jackman's testimony, would have been confused as to whether Dr. Jackman believed defendant was telling the truth about his symptoms. Indeed, Dr. Jackman confirmed that each of defendant's claimed symptoms was perfectly consistent with the physiological and mental effects of methamphetamine use. (I.e., "His description was . . . *almost the standard description*, you see something that you couldn't quite identify what it was, and then in your mind, it would become some object that you could identify, that you could recognize, but when you got up real close, you could recognize that this really wasn't what I thought it was"; "[memory loss] can go . . . all of the way from having complete amnesia to having a very spotty set of recollections *as* [*defendant*] *described*"; "And so the description that he gave of use of marijuana in relationship to the methamphetamine is *entirely consistent with literally hundreds of stories* that I've heard.") (Italics added.) Because the jury must have understood that Dr. Jackman believed defendant's report of symptoms to be genuine, we find no reasonable probability that exclusion of a question asking Dr. Jackman to expressly state whether he thought defendant was malingering affected the verdict adversely to defendant.

III

Stealing and Receiving the Truck

Defendant further contends that his conviction for receiving the stolen Toyota truck must be reversed because a person cannot be convicted of both stealing and receiving the same vehicle. The Attorney General concedes the point. We do not accept the concession.

As our Supreme Court explained in *People v. Garza* (2005) 35 Cal.4th 866 (*Garza*): "A person who violates [Vehicle Code] section 10851(a) by taking a car with the intent to permanently deprive the owner of possession, and who is convicted of that offense on that basis, cannot also be convicted of receiving the same vehicle as stolen property. [Citations.] If, on the other hand, a [Vehicle Code] section 10851(a) conviction is based on posttheft driving, a separate conviction under [Penal Code] section 496(a) for receiving the same vehicle as stolen property is not precluded. [Citations.]" (*Id.* at p. 876; *People v. Jaramillo* (1976) 16 Cal.3d 752, 754 (*Jaramillo*) [holding an accused may be convicted of both receiving a stolen vehicle and the unauthorized taking or driving of that same vehicle "*only* if his conviction of the Vehicle Code section is predicated on conduct not constituting a theft of the vehicle involved"].)

The "crucial issue" in this case is "whether the [Vehicle Code] section 10851(a) conviction is for a theft or a nontheft offense." (*Garza*, *supra*, 35 Cal.4th at p. 881.) In making this determination, we must be mindful that "on appeal a judgment is

presumed correct, and a party attacking the judgment, or any part of it, must affirmatively demonstrate prejudicial error." (*Ibid*.) Accordingly, "we begin with the presumption that defendant's dual convictions [for unauthorized taking or driving under Veh. Code, § 10851, subd. (a), and for receiving a stolen vehicle under Pen. Code, § 496d, subd. (a)] are valid; we will set aside either or both of the convictions only if defendant has affirmatively shown prejudicial error amounting to a miscarriage of justice." (*Ibid*.)

In *People v. Austell* (1990) 223 Cal.App.3d 1249, Austell was stopped by police as he was driving a stolen vehicle and was charged with and convicted of the unauthorized taking or driving of the vehicle and receiving the same vehicle as stolen property. (*Id*. at p. 1251.) Austell, like the defendant herein, claimed that these convictions were improper, arguing that the jury may have convicted him of stealing the vehicle in question on the theory that Austell was the thief. (*Id*. at pp. 1251-1252.) The Court of Appeal disagreed, explaining that "although the instructions on Vehicle Code section 10851 were not formally modified to delete reference to taking, the record as a whole shows [Austell] was not prosecuted as the thief[.]" (*Id*. at p. 1252.) As the court explained, the prosecutor conceded to the jury that there was no evidence that Austell took the vehicle and also told the jury that Austell was being prosecuted for unauthorized driving. (*Ibid*.) The court concluded that the fact that Austell was not prosecuted as the thief rebutted any inference the jury convicted him of a theft

offense; conviction on both counts was therefore proper. (*Ibid.*)

Similarly, here, defendant was simply not prosecuted as the thief. The People argued in closing argument that defendant violated Vehicle Code section 10851 by "*driving a stolen truck*." (Italics added.) As the People explained the charged offenses to the jury: "And in this case, the evidence has proved that [defendant] was *driving* a car that belonged to Mr. Diaz on that day of June 17th of 2007. On Father's Day of that year, this defendant, *drove* that car knowing it was stolen. By *driving* that car, he's in possession of that car. And while he was *driving* that car, knowing that it was stolen, he saw Officer Saunders and in an attempt to get away from Officer Saunders, he took off through a residential neighborhood in excess of 45 miles per hour, to try and avoid being caught by Officer Saunders *for driving that car*." (Italics added.) The People continued: "Now, for the last time, you'll see the *driving of the stolen car*. To prove that crime, the elements show that the defendant *drove* someone else's car without consent, and we have Mr. Diaz who came in here and told us that was his car. . . . We had the defendant himself, actually admitted he knew that the car was stolen, that he intended to deprive the owner of possession or ownership for any period of time. [¶] Well, Mr. Diaz, not having given the defendant any permission to drive his car, the *defendant intended to take that car or to drive that car, I'm sorry, without Mr. Diaz' consent and with the*

intent to deprive him of that car while the defendant was using it." (Italics added.)

While defendant makes much of the last quoted sentence, specifically the portion in which the People state that "defendant intended to *take* that car," the record reveals that the word "take" was a slip of the tongue that was quickly corrected by the People: "*or to drive that car*, I'm sorry, without Mr. Diaz' consent and with the intent to deprive him of that car *while the defendant was using it*." (Italics added.) We know this to be the case because if the People were actually arguing that defendant stole the vehicle, they would have argued that defendant intended to *permanently deprive* Mr. Diaz of the vehicle, as intent to temporarily deprive is insufficient to constitute theft, but sufficient to constitute unauthorized driving. (*Jaramillo*, *supra*, 16 Cal.3d at p. 758.)

According to the Attorney General's argument conceding the error, defendant's conviction must be reversed, not because defendant was convicted of both vehicle theft and receiving the same vehicle, but because the People told the trial court that the crimes of unauthorized driving and receiving stolen property were "alternative statements of the same crime." The Attorney General cites an exchange between the trial court and the People in which the court asked the People whether the receiving count was charged in the alternative, and the People initially responded in the affirmative. However, the People quickly corrected their response: "[A]ctually, your Honor, I would be making the argument, we don't have evidence other than the

defendant's statement to his psychologist or psychiatrist, Dr. Jackman, that he actually in fact took the car. [¶] *The only evidence that the People have is that he was driving the car, knowing that it was stolen. So, in regard*[] *to that, the People will be making the argument that he was driving it knowing it was stolen, not that he took it*." That is precisely what the People argued to the jury.

Because the record reveals that defendant's conviction under Vehicle Code section 10851, subdivision (a), was not a conviction for theft, his conviction for receiving a stolen vehicle under Penal Code section 496d, subdivision (a), need not be reversed. (*People v. Cratty* (1999) 77 Cal.App.4th 98, 103.)

IV

Instructional Errors

Defendant's claims of instructional error will be addressed and rejected in turn.

A

First, defendant asserts the trial court prejudicially erred by failing to instruct the jury, sua sponte, that a person cannot be convicted of both stealing and receiving the same vehicle.

Where a defendant may be legally convicted of only one of multiple alternative charges, i.e., theft and receiving stolen property that was taken in the theft, the trial court has a sua sponte duty to instruct the jury that it may convict the defendant of one, but no more than one, of the alternative

offenses. (*Garza*, *supra*, 35 Cal.4th at p. 881; *Jaramillo*, *supra*, 16 Cal.3d at p. 757; CALCRIM No. 3516.)

In this case, as explained above, the People elected to rely on an unauthorized driving theory of defendant's violation of Vehicle Code section 10851, subdivision (a). Where a defendant is convicted of unauthorized driving, as opposed to the theft of the vehicle, he or she may legally be convicted of both the unauthorized driving of the vehicle and the receipt of the same vehicle. Accordingly, CALCRIM No. 3516 was not implicated by the facts of this case, and the trial court did not err by failing to instruct thereon.

B

Second, defendant asserts the trial court prejudicially erred by failing to provide the jury, sua sponte, with a unanimity instruction. This assertion must be rejected for the same reason.

"Generally, where evidence shows more than one act which could constitute the charged offense and the prosecutor does not elect to rely on any one such act, a unanimity instruction may be required." (*People v. Haynes* (1998) 61 Cal.App.4th 1282, 1294; *People v. Diedrich* (1982) 31 Cal.3d 263, 281; CALCRIM No. 3500.) The purpose of the unanimity instruction is to protect the defendant's constitutional right to have the jury unanimously agree on the criminal conduct that supports his conviction. (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 611.)

While defendant correctly observes that a person may be convicted of violating Vehicle Code section 10851, subdivision (a), based on either the theft of the vehicle or the unauthorized driving of the vehicle, once again, the record demonstrates that the People did not pursue both theories of criminal liability, instead electing to rely on defendant's unauthorized driving of the vehicle. Accordingly, CALCRIM No. 3500 was not implicated by the facts of this case, and the trial court did not err by failing to instruct thereon.

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

SCOTLAND, P. J.

ROBIE, J.